Rohani a/p Tengkah (widow suing on her behalf and on behalf of her two children, as dependance of Zinuddin bin Sipoh, deceased) v Zainal bin Lani & Anor

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12–173 OF 2000
MOHD HISHAMUDIN J
20 DECEMBER 2003

Civil Law Act — Damages — Dependency claim — Multiplicand — Whether wrong multiplicand used — How multiplicand arrived at

Civil Law Act — Damages — Dependency claim — Award — Deduction from — Whether one third deduction from award justified on grounds of contingencies and vicissitudes of life and accelerated payment — Civil Law Act 1965 s 7

Tort — Negligence — Contributory negligence — Whether established — Consideration of facts and circumstances

The plaintiff appealed against the decision of the sessions court judge, who in allowing the plaintiff's claim for negligence against the defendants, made a finding that the plaintiff was guilty of contributory negligence and as a consequence, reduced the award by 25%. The plaintiff appealed on the grounds that: (a) the judge erred in making a finding of a 25% contributory negligence against the plaintiff; (b) that the judge used the wrong multiplicand of RM500 considering that the deceased's salary was RM1,300; and (c) that the judge had erred when he deducted 1/3 from the award for contingencies and vicissitudes of life and accelerated payments.

Held, allowing the appeal with costs in respect of contributory negligence and the multiplicand but disallowing in respect of the issue of deduction for contingencies

(1) Based on the facts and circumstances of the case, there was no basis to hold that the defendant was guilty of contributory negligence (see para 13).

(2) The modern trend of arriving at a multiplicand is by deducting a percentage from the monthly earnings, instead of going through labouriously and painstakingly in detail on the various expenditures incurred by the deceased when alive, in order to determine his living expenses. Accordingly, a one third deduction was made from the deceased's monthly earnings which meant that the multiplicand arrived at was RM900, after deducting RM400 from RM1,300 (see paras 39–40).

(3) A one third deduction from the award for contingencies and vicissitudes of life and accelerated payment was maintained (see para 43).

Obiter dicta:

The High Court judge resisted the temptation to remark that as there was no provision for a further deduction for contingencies and vicissitudes of life

and accelerated payment in the scheme of s 7 of the Civil Law Act 1956, and that that section had already specified or prescribed in detail what should be included and what should excluded or deducted and the method of calculation, in calculating the sum to be awarded, there was much force in the argument of the learned counsel in the present case (see para 46).

[**Bahasa Malaysia summary**

Plaintif telah merayu terhadap keputusan hakim mahkamah sesyen, yang dalam membenarkan tuntutan plaintif untuk kecuaian terhadap defendan-defendan, telah membuat penemuan bahawa plaintif adalah bersalah kerana kecuaian sertaan dan akibat daripada itu, telah mengurangkan award kepada 25%. Plaintif telah merayu atas alasan bahawa: (a) hakim telah terkhilaf dalam membuat penemuan 25% kecuain sertaan terhadap plaintif; (b) hakim telah menggunakan pengganda yang salah iaitu RM500 dengan mengambilkira gaji si mati adalah RM1,300; dan (c) hakim telah terkhilaf apabila memotong 1/3 daripada award untuk kontingensi dan jatuh bagun dalam kehidupan dan bayaran tambahan.

Diputuskan, membenarkan rayuan dengan kos berkaitan kecuaian sertaan dan pengganda tetapi tidak membenarkan berkaitan persoalan potongan untuk kontengensi:

(1) Berdasarkan fakta dan keadaan kes, tiada asas untuk memutuskan bahawa defendan bersalah kerana kecuaian sertaan (lihat perenggan 13).

(2) Trend moden untuk tiba kepada suatu pengganda adalah dengan memotong satu peratusan daripada pendapatan bulanan, selain daripada meneliti secara mendalam pelbagai perbelanjaan yang dikenakan oleh si mati semasa hayatnya, bagi tujuan menentukan perbelanjaan hidup beliau. Oleh demikian, potongan satu pertiga telah dibuat daripada pendapatan bulanan si mati yang bermaksud bahawa pengganda yang diperolehi adalah RM900, selepas memotong RM400 daripada RM1,300 (lihat perenggan-perenggan 39–40).

(3) Potongan satu pertiga daripada award untuk kontengensi dan jatuh bangun kehidupan dan bayaran tambahan dikekalkan (lihat perenggan 43).

Obiter dicta:

Hakim Mahkamah Tinggi enggan membuat kenyataan bahawa tidak terdapat apa-apa peruntukan untuk potongan seterusnya untuk kontengensi dan jatuh bangun kehidupan dan bayaran tambahan dalam skima s 7 Akta Undang-Undang Sivil 1956, dan bahawa seksyen tersebut telahpun menspesifikasikan atau menetapkan secara terperinci apa yang patut dikecualikan atau dipotong dan cara pengiraan, dalam pengiraan jumlah yang akan diawardkan, terdapat hujah yang kukuh oleh peguam yang bijaksana dalam kes semasa (lihat perenggan 46).]

Notes

For cases on dependency claims, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 3267.

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 743–786.

For contributory negligence, see 5 *Halsbury's Laws of Malaysia* para [80.204].

For maintenance of spouse and children, see 8 *Halsbury's Laws of Malaysia* (2003 Reissue) paras [140.376]–[140.386].

Cases referred to

Chan Chin Ming & Anor v Lim Yoke Eng [1994] 3 MLJ 233 (refd)

Chang Chong Foo & Anor v Shivanathan [1992] 2 MLJ 473 (refd)

Low Suit (m, w) Administratrix of the estate of Tan Mee Ho (f) and Tan Mee Kiau (f) both deceased v Lim Sun Hiang t/a Syarikat Ta Thong & Anor [1992] 2 CLJ 1035 (refd)

Marappan & Anor v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99 (refd)

Rebecca Mathew & Ors v Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd & Anor [1990] 1 MLJ 443 (refd)

Takong Tabari v Government of Sarawak & Ors and another appeal [1998] 4 MLJ 512 (refd)

Legislation referred to

Civil Law Act 1956 s 7(3)(iv)(c), (d)

Appeal from: Civil Suit No 53–1351 of 1998 (Sessions Court, Klang)

Daljeet Singh (Sarjeet Singh with him) (Daljeet S Sachdev & Co) for the appellant/plaintiff.

Adrian Thambyrajah (Azim Tunku Farik & Wong) for the respondents/defendants.

Mohd Hishamudin J:

[1] This is an appeal by the appellant/plaintiff against the decision of the learned sessions court judge who, in allowing the plaintiffs claim for negligence (running down) against the respondents/defendants, made a finding that the plaintiff was guilty of contributory negligence; and, as a consequence, reduced the award by 25%.

[2] The appeal is against the finding of contributory negligence as well as on quantum.

[3] The facts of the case are as follows.

[4] On 23 March 1998, a road accident occurred along the Klang-Port Dickson main road, at Km 62. The accident involved a collision between a motorcycle and a lorry. The motorcycle was driven by the deceased husband of the plaintiff, whilst the lorry was driven by the first defendant. The deceased husband of the plaintiff died of injuries sustained as a result of the accident. He was 27 years old when he died.

[5] The first defendant is sued by the wife and children of the deceased, as dependence, for the tort of negligence, whilst the second defendant, as the registered owner of the lorry as well as the employer of the first defendant, is sued for vicarious liability in respect of the tort of the first defendant.

[6] The deceased was an *Orang Asli* who lived with his family in Kampung Orang Asli Tanjung Sepat.

[7] It is not disputed that on the day in question the deceased's motorcycle and the first defendant's lorry were travelling in the same direction, that is to say, from the direction of Klang towards the direction of Port Dickson; and that the deceased's motorcycle was travelling in front of the first defendant's lorry. It is also common ground that the collision occurred while the first defendant's lorry was in the midst of overtaking the deceased's motorcycle.

[8] It is, however, the contention of the plaintiff that the first defendant was negligent in that he tried to overtake the deceased's motorcycle when in the circumstances it was dangerous to do so; the circumstances being:

(a) that there was a 'double line' traffic sign on the road, meaning that the first defendant was prohibited from overtaking;

(b) that to the front of both vehicles, there was a junction to the right leading to an Orang Asli settlement known as Kampung Orang Asli Tanjung Sepat; and

(c) that both vehicles were travelling in a residential kampong area.

[9] Based on the evidence, the learned sessions court judge made a finding that the first defendant was negligent when he overtook and knocked the deceased's motorcycle. There is no appeal by the defendants against the finding of negligence by the learned sessions court judge.

[10] However, the learned sessions court judge at the same time also found the deceased motorcyclist guilty of contributory negligence and, accordingly, reduced the award by 25%.

[11] The plaintiffs first ground of appeal is against this finding of 25% contributory negligence. The plaintiff contends that there was no contributory negligence on the part of the deceased.

[12] I allowed the appeal in respect of this first ground.

[13] In my view, there is no basis to hold that the deceased was guilty of contributory negligence.

[14] The burden is on the first defendant to prove on a balance of probabilities that the deceased was guilty of contributory negligence. I do not think that that legal and evidential burden was successfully discharged by the first defendant. The evidence of the first plaintiff as to how the accident occurred is not at all that clear.

[15] In my judgment, the first defendant was driving dangerously when he tried to overtake the deceased on a stretch of road where not only was overtaking prohibited by law (because of the traffic double line sign) but at the same time he overtook the deceased without fully using the oncoming lane. It can be fairly inferred from the sketch plan that the first defendant did not use the oncoming lane to overtake the deceased's motorcycle because the lorry brake marks began not on the oncoming lane but from the centre double line. That this was so is also clear from his evidence when he said:

> Selepas bunyikan hon motosikal itu terus ke tepi. Bila motosikal ke tepi saya pun cuba hendak memotong dia. Tayar kanan lori saya masuk ke sebelah kanan kerana saya hendak memotong. Saya memasuk ke kanan lebih kurang 1 kaki sahaja.

[16] From the above evidence, the question arises: when the first defendant wanted to overtake, why did the first defendant manoeuvre his lorry to the extent that only the right wheel of the lorry move one foot (or more) onto the oncoming lane? Why did he not move the whole lorry onto the oncoming lane? That he did not do so only goes to show that in trying to overtake the deceased's motorcycle, the first defendant was not making full use of the oncoming lane but, instead, was trying to squeeze his lorry as much as possible in the same lane as the motorcyclist's lane, thus creating a very dangerous situation for the motorcycle. Therefore, not only did the first defendant violate the no-overtaking rule but he had also carried out the overtaking in a dangerous manner.

[17] That the first defendant was a dangerous driver was further borne out by the following facts that reflect poorly his attitude on road safety. First, he did not take traffic signs seriously; for, he admitted not noticing the traffic double line traffic sign. Second, he was determined to overtake the deceased's motorcycle although he knew that under the circumstances it was dangerous to do so. This is borne by his own evidence when he said:

> Saya tak perasan tempat itu ada double line. Saya masuk ke kanan sebab keadaan merbahaya. *Saya hendak memotong dia juga*. Bahaya kerana dia menunggang dalam keadaan ke tengah dan ke tepi. (Emphasis added.)

[18] The first defendant, however, in his evidence, did not allege contributory negligence on the part of the deceased's motorcyclist. Instead, he put the blame on the motorcyclist. But, as I have said, his account is not that all too clear. He alleged that it was not his lorry that grazed into the deceased's motorcycle from the rear, but on the contrary, it was the deceased's motorcycle that moved from the edge of the road to the centre of the road, while the first defendant was in the midst of overtaking, and knocked (or grazed) into the left side of the first defendant's lorry. He said:

> Saya potong motosikal itu dan motosikal itu pergi ke tengah jalan. Motosikal itu kena pada bahagian kiri hadapan lori saya.

[19] I am unable to accept this account of the accident by the first defendant which implies that the deceased was not guilty of contributory negligence but was guilty of negligence himself.

[20] The learned sessions court judge's reasoning for the finding of contributory negligence on the part of the deceased motorcyclist is given by as follows:

> Setelah mendengar keterangan Defendan (1) dan keterangan Pegawai Penyiasat serta meneliti kepada rajah kasar, saya puashati bahawa kemalangan ini berlaku adalah disebabkan oleh kecuaian Defendan (1) yang memandu dalam keadaan yang merbahaya. Walau bagaimanapun versi Defendan (1) tidak dicabar apabila dia mengatakan bahawa dia telah membunyikan hon sebelum memotong dan bahawa motosikal si mati dalam keadaan ke tengah ke tepi. Selain itu saya juga percaya besar kemungkinan berlaku kemalangan seperti versi Defendan (1) iaitu semasa proses memotong, motosikal si mati bergerak ke kanan untuk tujuan masuk ke Simpang Tg. Sepat yang berada di kanan. Oleh itu kemalangan berlaku dalam keadaan bergesel. Oleh itu saya mendapati terdapat sedikit kecuaian sumbangan di pihak si mati sendiri dan saya memutuskan kecuaian si mati setakat 25% dan liabiliti terhadap Defendan-Defendan setakat 75% sahaja.

[21] With respect, I am not able to agree with the above rationale. Let us analyse the above passage. First, it is said:

> Walau bagaimanapun versi Defendan (1) tidak dicabar apabila dia mengatakan bahawa dia telah membunyikan hon sebelum memotong dan bahawa motosikal si mati dalam keadaan ke tengah ke tepi.

[22] The above statement is, with respect, only partially correct. True, the first defendant's evidence was not challenged when he said that he did sound his horn. But this evidence is insignificant on the issue of contributory negligence. For, according to the first defendant, after he had sounded his horn the motorcyclist moved to the side of the road. However, with respect, it is not correct to say that the first defendant's statement that the deceased's motorcycle was moving to the centre and to the side of the road was not challenged. For, from the notes of evidence, the first defendant's evidence was in fact challenged by the plaintiffs counsel during the cross-examination of the first defendant. It is clear from p 39 of the appeal record as follows:

> Q: Saya katakan motosikal itu di hadapan awak dan tak sama sekali ke tengah dan ke tepi?
>
> A: Tak setuju.

[23] Further, it is important to note that the first defendant merely said:

> Bahaya kerana dia menunggang dalam keadaan ke tengah dan ke tepi.

[24] This statement is vague. What did the first defendant mean by this evidence? There was no clarification or elaboration by the witness. Bearing in mind that the motorcyclist is dead and hence there is no likelihood of the evidence being rebutted, such vague evidence as this should not have been so easily accepted by the sessions court on its face value; instead it must be viewed with suspicion. And it is all the more so when this evidence is not consistent with the police report made by the first defendant after the accident. In his police report lodged on the same day after the accident, his description as to what preceded the accident was not as mild or vague as his

testimony in court: for in the report his allegation against the deceased was a little clearer but more serious. There, the first defendant had used the word *'hoyong hayang'* (swaying to the left and to the right) to describe the manner the deceased rode his motorcycle. In any case, even if the first defendant's evidence were to be taken on its face value, still it is too vague to form the basis of a finding of contributory negligence.

[25] Then the learned sessions court judge goes on to state:

> Selain itu saya juga percaya besar kemungkinan berlaku kemalangan seperti versi Defendan (1) iaitu semasa proses memotong, motosikal si mati bergerak ke kanan untuk tujuan masuk ke Simpang Tg Sepat yang berada di kanan.

[26] This statement, with respect, is also not correct. There is nothing in the first defendant's evidence (except in his police report) that states that the deceased's motorcycle moved to the right with the intention of entering the side road on the right that lead to Tg Sepat.

[27] My conclusion on this issue is that the finding of contributory negligence by the learned sessions court judge was against the weight of evidence.

[28] The next ground of appeal is on the multiplicand used by the learned sessions court judge in calculating the sum to be awarded. The deceased earned RM1,300 per month. He had a wife and two children (all three are the plaintiffs in the present dependency claim). Out of the RM1,300, he gave RM900 to his wife/plaintiff (a housewife) for the family expenses. No evidence is lead as to what happened to the RM400 (ie RM1,300 - RM900 = RM400) kept by the deceased. From the RM900 that she received from the deceased, the plaintiff/wife in turn gave RM100 to the deceased's parents, ie her in-laws, RM100 to her own parents, and RM40 to her *adik* (ie a younger sibling, but it is not stated in the evidence whether it was a younger brother or a younger sister of the plaintiff).

[29] From the monthly earnings of RM1,300, the learned sessions court judge arrived at a multiplicand of RM500. This is how he arrived at this sum of RM500. The learned sessions court judge began with the figure of RM900 as his base figure. He did not explain why he did not use the monthly earnings of RM1,300 as his base figure. Be that as it may, from the sum of RM900, the learned sessions court judge made several deductions, that is to say:

(a) he deducted a sum of RM100 which the plaintiff/wife gave to the deceased's parents;

(b) he deducted a sum of RM100 which the plaintiff/wife gave to her own parents; and

(c) he deducted a sum of RM40 which the plaintiff/wife gave to her younger sibling;

[30] and arrived at the balance sum of RM660. From this balance sum of RM660, the judge made a further deduction of RM160 (I must admit here that the learned sessions court judge did not specifically mention the

amount 'RM160' but this sum is arrived at arithmetically by subtracting RM500 from RM660) on the ground that the deceased, whilst alive, lived with the plaintiff/wife and children and 'consumed the food bought by the plaintiff/wife'. In deducting the sum of RM160, this is what the learned sessions court judge said:

> Oleh kerana si mati tinggal di rumah yang sama dan makan di rumah atas makanan yang dibeli oleh plaintiff, maka ini juga harus diambilkira untuk tolakan. Oleh itu, saya berpendapat hilang tanggungan kepada plaintif dengan dua orang anaknya dalam kes ini adalah sebanyak RM500 sebulan adalah munasabah.

[31] Having made the deduction of RM160, the learned sessions court judge arrived at the multiplicand of RM500.

[32] The learned counsel for the appellant submitted that a multiplicand of RM500 was too low, considering that the monthly earnings of the deceased was RM1,300. He proposed a multiplicand of RM900.

[33] The learned sessions court judge did not cite any authority to justify the various deductions that he had made.

[34] In my judgment, and with respect, the approach taken by the sessions court judge was wrong in law. He should have taken the whole of the deceased's earnings of RM1,300 as the starting point (ie as the base figure). He cannot ignore the RM400 which the deceased kept to himself. He should not have deducted from the base figure of RM1,300:

(a) the RM400 which the deceased kept to himself;

(b) the RM100 which the plaintiff/wife gave to the deceased's parents;

(c) the RM 100 which the plaintiff/wife gave to her own parents;

(d) the RM40 which the plaintiff/wife gave to her younger sibling; and

(e) the RM160 which he (the judge) estimated to be the sum spent for food consumed by the deceased.

[35] There is no legal basis for him to do so. Under the law, what can lawfully be deducted from deceased's earnings are the deceased's living expenses. This is stipulated by para (iv)(c) of the proviso to subsection (3) of s 7 of the Civil Law Act 1956. Paragraph (iv)(c) of the proviso states:

> (iv) in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall:
>
> (c) take into account any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the person deceased at the time of his death.

[36] What, then, is 'living expenses'? In *Chang Chong Foo & Anor v Shivanathan* [1992] 2 MLJ 473, Harun Hashim SCJ said (at p 479):

> What then is meant by living expenses in (iii)? It is trite law that words in a statute must be given their ordinary meaning. The *Shorter Oxford English Dictionary* defines 'living' as: 'The action, process, or method of gaining one's livelihood. The means of living; livelihood, maintenance. 'Expenses' means 'Money out of pocket'.

[37] In my judgment, all the above items (with the exception of item (e)) are not the deceased's living expenses. As to item (a), just because from the earnings of RM1,300 the deceased kept this sum of RM400 to himself and only gave RM900 to the plaintiff/wife, the court cannot treat the RM400 so withheld to be the living expenses of the deceased. There must be evidence that the deceased used the money for his living expenses, like buying clothes and food. What were given away by the plaintiff to various persons under items (b) to (d) on her own freewill are obviously not the living expenses of the deceased. As to item (e), granted that the deceased's food expenses can be taken as his living expenses, still, it was only a part of his living expenses and there is no evidence to justify the deduction of a specific sum of RM160. Such quantification was mere guesswork.

[38] As I see it, paragraph (iv) (c) of the proviso can give rise to problems of interpretation. For instance, if this paragraph is given a literal interpretation, plaintiffs claiming through a victim who had lived an extravagant life will be penalised relative to plaintiffs who claim through the thrifty victim (Reiss, Seth M, *Quantum for future loss in personal injury and fatal accident cases after the Civil Law (Amendment) Act 1984,* MLJ, Aug 1985 lxii, at lxvi n 50). In the context of the present case, a literal interpretation of the paragraph would mean that there would not be any deduction at all for living expenses since, strictly, by relying on items (a) to (e) above, no sum 'is proved or admitted to be the living expenses of the deceased' (or, perhaps, there should only be a minimal deduction for living expenses in the light of item (e), though the amount to be deducted need not necessarily be RM160). But, surely, this cannot be the case. It is a fact of life that each one of us, who earns, will incur living expenses.

[39] With the foregoing difficulty in mind, in the case that is now before me, I do not propose to give the paragraph a literal interpretation. Instead, I propose to adopt what LC Vohrah J in *Low Suit (m, w) Administratrix of the estate of Tan Mee Ho (f) and Tan Mee Kiau (f) both deceased v Lim Sun Hiang t/a Syarikat Ta Thong & Anor* [1992] 2 CLJ 1035, at p 1036 called the 'modern trend', that is, the practice of merely deducting a percentage from the monthly earnings, instead of going through labouriously and painstakingly in detail on the various expenditures incurred by the deceased when alive, in order to determine his living expenses. In the case cited, the learned judge, having referred to *Rebecca Mathew & Ors v Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd & Anor* [1990] 1 MLJ 443 said:

> ... I would, in accordance with the modern trend, deduct one-third from the first deceased's wages as living expenses leaving the remainder as surplus income. Similarly for the second deceased.

[40] Accordingly, following the modern trend, I shall deduct approximately 1/3 (strictly, 1/3 of RM1,300 is RM433, but for ease of calculation, I propose to round up the figure to RM400) from the deceased's monthly earnings of RM1,300 and arrived at the multiplicand of RM900 (ie RM1,300 - RM400 = RM900). The appeal in respect of the multiplicand is thus allowed. The award is adjusted accordingly based on this new multiplicand.

[41] Just for the record, the multiplier used by the learned sessions court judge in calculating the loss of earnings was 16, since the deceased was 27 years old at the time of his death. This is in conformity with para (iv)(d) of the proviso to s 7(3). The adoption of this multiplier is accepted by the appellant and respondents.

[42] The third ground of appeal concerns the deduction by the learned sessions court judge of % from the award for contingencies and vicissitudes of life and accelerated payment. The relevant part of his judgment reads:

> Bagi kehilangan tanggungan selepas perbicaraan untuk baki 160 bulan adalah berjumlah RM80,000. Walau bagaimanapun [dari] jumlah ini ditolak ¼ menjadikan jumlah yang dibenarkan unruk hilang tanggungan selepas perbicaraan sebanyak RM60,000. Penolakan ini adalah bagi kontigensi, jatuh banguan kehidupan dan bayaran terkumpul seperti yang diputuskan dalam kes *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512.

[43] The learned counsel for the appellant/plaintiff in his written submission argued that there should not be this further deduction for contingencies and vicissitudes of life and accelerated payment since s 7(3) of the Act, by prescribing the statutory multiplier in the computation of future loss of earnings, has already taken into account contingencies and vicissitudes of life and accelerated payment. Learned counsel refers to *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99.

[44] It is not clear why the learned sessions court judge made a deduction of only for contingencies and vicissitudes of life and accelerated payment when *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512 prescribes a deduction of one third.

[45] Be that as it may, I do not propose to disturb this part of the decision since as a High Court judge I am bound by the decision in *Takong Tabari,* a decision of the Court of Appeal. In *Takong Tabari,* Siti Norma Yaakob JCA (as she then was) in delivering the decision of the Court of Appeal said (at pp 522–523):

> The learned trial judge did not stop there but went on to deduct a sum of RM90,000 equivalent to 1/3 from the total sum calculated thereby leaving a balance of RM180,000 payable. Apart from stating that the 1/3 deduction was for contingencies, other vicissitudes of life and accelerated payment, he did not identify what such deduction relate to.
>
> It is the widow's contention that such a deduction is contrary to law as by the introduction of proviso (d) to s 7(3)(iv) of the Act on 1 October 1984, the discre-

tion to deduct a sum for contingencies, other vicissitudes of life and accelerated payment at common law is now no longer available and with the replacement of that common law practice, there is already a built-in deduction in the statutory formula itself and a further deduction as was done in this case was not proper. She contends that the estate is entitled to be paid the total sum of RM270,000 for her claim for loss of dependency. For this contention she relies on the minority decision of the Supreme Court in the case of *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233.

As a court that is inferior to the Supreme Court, we are bound by the principle of *stare decisis* to accept the majority decision in *Chan*'s case. That majority judgment states that as a matter of interpretation if Parliament had intended to depart from the general system of law, it would express its intention with irresistible clearness. Since it found such clearness missing in proviso (d), the common law practice of making deductions for contingencies of life and accelerated payment continues to be in force. Under such circumstances and in reliance of the majority decision in *Chan*'s case, we found that the learned trial judge made no error of law when he made the deduction and reduced the claim for loss of dependency to RM180,000.

[46] However, be that as it may, with the greatest respect and in all humility, I cannot resist the temptation to remark that as there is no provision for a further deduction for 'contingencies and vicissitudes of life and accelerated payment' in the scheme of s 7 of the Act, and that that section has already specified or prescribed in detail what should be included and what should be excluded or deducted and the method of calculation, in calculating the sum to be awarded, there is much force in the argument of the learned counsel in the present case (except for his reliance on *Marappan,* for on the facts and issues that case can be distinguished) and of the counsel for the widow in *Takong Tabari.* There is also strong merit in the minority judgment of Edgar Joseph Jr SCJ in *Chan Chin Ming & Anor v Lim Yoke Eng* [1994] 3 MLJ 233 (where, in his Lordship's opinion, to ignore the fixed multiplier of 16 years '*would be to fly in the face of the mandatory provisions*' of s 7(3)(iv)(d)). I respectfully and humbly hope a time will come very soon when our Federal Court will have an opportunity to consider *Takong Tabari* and to reconsider *Chan Chin Meng.* Accordingly, the appeal in respect of the deduction of ¼ from the award of RM80,000 of the sessions court judge (which is now adjusted and increased by reason of the new multiplicand of RM900) for contingencies and vicissitudes of life and accelerated payment is dismissed.

Appeal allowed with costs in respect of the issue of contributory negligence and multiplicand; but disallowed in respect of the issue of deduction for contingencies.

Reported by Mariette Peters-Goh